

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 70 OF 2019**

**HABEL MWAGHA SALIMO.....**  
**.....CLAIMANT**

**VERSUS**

**TAVEVO WATER & SEWERAGE CO.**  
**LIMITED.....RESPONDENT**

**JUDGMENT**

**Background**

1. Asserting that at all material times he was an employee of the Respondent and whose employment was summarily dismissed without regard to the edicts of procedural and substantive fairness, the Claimant has sued the Respondent herein, seeking the following declaratory and compensatory reliefs;

- a) That the Respondent be ordered to pay the Claimant his terminal and contractual dues amounting to Kshs. 19,330,448.00
- b) A declaration that termination of the Claimant's employment was unfair, unjust, and wrongful.
- c) Cost of this claim and interest thereon at court rates
- d) Any other relief that this Honourable court may deem just and fit to grant.

2. He tabulated the cumulative amount mentioned above as follows;

- a) Three months' salaries in lieu of notice, Kshs. 750,000.00
- b) Compensation for unfair termination (Kshs. 250,000x12 months), Kshs. 3,000,000.00
- c) Gratuity at 31% (Contract period 2015-2018 & 2018-2021), Kshs. 5,580,000.00.
- d) Unpaid salary;
  - (Half pay May & June 2018) Kshs. 250,000.00
  - (Full pay July 2018-August 2021) Kshs. 9,250,000.00

e) Reimbursements;

(Monthly Airtime allowance@5,000[May 2018-Aug2021]) Kshs. 195,000.00

(Car mileage@Kshs.7832 [May 2018-Aug2021])  
Kshs. 305,448.00

**TOTAL Kshs.19,330,448.00**

3. The Respondent resisted the Claimant's claim through a Memorandum of Response dated 6<sup>th</sup> June 2022, denying that the Claimant was wrongfully and unfairly dismissed from employment and that he is entitled to the reliefs sought.
4. At the hearing, the parties adopted their respective witness statements filed herein as their evidence in chief, and produced the documents filed under their lists of documents as their exhibits.

### **Claimant's case**

5. The Claimant, Habel Mwagha Salimo, states that he was employed by the Respondent under a three-year contract commencing on 1st August 2015 as Managing Director, earning a monthly salary of Kshs. 250,000. His contract

was subsequently renewed for a further three-year term, effective 1st August 2018, and was to run until 31st July 2021.

6. On 3rd January 2018, he received a letter from the County Executive Committee Member (CECM) in charge of Water and Irrigation, requesting certain reports to enable him to understand the operations of the Respondent Company. He assigned the task of generating the reports to the Finance and Administration Manager on 4th January 2018, as the line manager responsible for all the Respondent's financial reports.
7. On 8th January 2018, he forwarded the reports to the CECM under cover of his letter of the same day. However, on 1st February 2018, the CECM issued him with a letter placing him on indefinite compulsory leave, alleging that the Company was insolvent and could therefore not meet its obligations. The letter alleged that this conclusion flowed from the report that the Claimant had forwarded to the CECM.

8. The Claimant contends that the decision was irregular and unlawful. The CECM had requested a meeting to discuss the report, but it had not taken place. Only the Company's Board of Directors had disciplinary authority over him, and any action against him could be taken by a resolution of the Board. At the time, the Company was performing much better financially.
9. Aggrieved by the decision to place him on compulsory leave unlawfully and irregularly, he, together with the Finance Manager, moved to the Employment and Labour Relations Court at Mombasa and obtained interim orders staying the compulsory leave and restraining interference with the discharge of his duties.
10. On 25th February 2018, he received a letter from the CECM dated 23rd February 2018, requesting that he report back to the office in compliance with the Court order. Upon returning to work, he found that his office locks had been changed and that the Company's bank signatories had been altered without lawful authority. His requests to the CECM to have him restored as a signatory

to the accounts of the Respondent Company yielded no fruit.

11. On or about 15th March 2018, a new Board for the Respondent was constituted. On 16th March 2018, the new Board Chairman visited the Claimant's office and informally advised him to proceed on leave, as he did not currently have the support of the County Government to continue working without first improving his relationship with them. He obliged and applied for leave. The leave was extended each time he utilised the days he had applied for, until he exhausted all the outstanding leave days.

12. Subsequently, on 27th June 2018, he was issued with a suspension letter on grounds of alleged non-performance and irregular employment contract, and was placed on half salary. He contends that the suspension was based on inaccurate and unsubstantiated allegations, including reference to audited financial statements and a forensic audit report which had neither been finalised nor made available to him.

13. He responded to the allegations within the stipulated period. On 19<sup>th</sup> July 2018, he received an email from the Chairman of the Board requesting that he return the company's laptop. He complied. On 25<sup>th</sup> July 2028, he received a call from his Secretary conveying a message from the Chairman that he was required to appear before the Board the following day, 26<sup>th</sup> July 2018.
14. On 26<sup>th</sup> July 2018, when he was ushered into the meeting, the Chairman indicated to him that the meeting was an HR Committee meeting, whose purpose was to enable them have a deeper understanding of the operations of the Company. The meeting was a general discussion of the Company's operations, and at no time was the suspension letter or his response thereto discussed. The meeting ended at 2:20 p.m.
15. Later the same day, he received a letter of summary dismissal, effective 1st September 2018. He avers that the dismissal was abrupt, malicious, and effected without substantive justification or procedural fairness, contrary to sections 35, 41, 43, 44, 45 and 49 of the Employment Act,

2007. He further states that his salary up to 31st August 2018 and other terminal dues were not paid despite repeated demands.

16. Cross-examined by Counsel for the Respondent, the Claimant testified that he was placed on compulsory leave by the CECM's letter dated 1st February 2018. The letter did not set out the reasons for his compulsory leave. It only stated that the Company was insolvent and could not meet its obligations.

17. Subsequently, he was served with a suspension letter dated 27<sup>th</sup> June 2018. The letter did set out the reasons for the suspension, nonperformance, and irregular employment contract. The letter informed that the suspension was investigatory.

18. On 25<sup>th</sup> July 2018, he received an email of the same date, inviting him to a disciplinary hearing that was slated for the same day.

19. On 26<sup>th</sup> July 2018, he attended a Human Resources Committee meeting. He attended it in response to the above-stated email.
20. In the dismissal letter dated 24<sup>th</sup> August 2018, the reasons for the dismissal were stated as negligence of duty and non-compliance. The questions that he was asked during the meeting had nothing to do with the grounds of dismissal.
21. He was accused of running the Company without an approved Human Resources Manual, Finance Manual, Business Plan, and Departmental Standard Operating Procedures. He sufficiently responded to these accusations.
22. He further testified that during the meeting, one of the Directors, Malai, raised an issue about a voucher that apparently had no vote book control. He responded that this surprised him. However, he sought more time to review the vouchers and provide an informed response later.

23. He further stated that during the meeting, Dr Jimmy Kihara sought to know why he had upheld staff salary increments, yet the Board had revoked the same. He explained to the Committee that there had been no salary increment, but an attempt to harmonise the Respondent's staff salaries, a process mishandled by those who carried it out.
24. On the Counsel's indication that the Auditor General's report appears to complain that a decision of the evaluation committee had been changed by an unsigned note that did not bear the name of the Managing Director, the Claimant replied that the issue hadn't been put to him during the audit process and that, as such, he was not able to comment on it.
25. The responsibility of extending the Managing Director's contract vested in the Board of Directors. A request for extension of the Managing Director's contract was supposed to be made not more than 6 months and not less than three months before the expiry date of the initial contract. He sought the extension of his contract through

his letter dated 31<sup>st</sup> October 2017. The letter was written approximately nine [9] months before the expiry of the contract.

26. In his evidence in re-examination, the witness stated that the email that invited him to appear before the Board of Directors was silent on the reason for the invitation. From the minutes presented in evidence by the Respondent, it is apparent that they are for the 25<sup>th</sup>, 26<sup>th</sup>, and 27<sup>th</sup> of July 2018. He only appeared before the HR Committee on 26<sup>th</sup> July 2018. The issue of procurement, or his role in the Respondent's procurement processes, was not discussed during the meeting.

27. His letter dated 31<sup>st</sup> October 2017, requesting an extension of his contract, was a response to the Board of Directors' letter of the same date, signed by the Chairman, which asked him to apply. No doubt, the Board of Directors initiated the process to renew his contract.

### **Respondent's case**

28. The Respondent called two witnesses to testify on its behalf. The first witness, Mohammed Ali, stated that the

Claimant was appointed as Managing Director on 1st August 2015 under a three-year contract with a consolidated salary of Kshs. 250,000, which was subsequently renewed in November 2017 on similar terms.

29. His employment was subject to performance appraisals by the Board and to the provisions of the Employment Act and the Respondent's Human Resource Policy Manual, which permitted disciplinary action, including summary dismissal, for poor performance, neglect of duty, and financial or procurement irregularities.
30. The Claimant's tenure was characterised by fundamental flaws, particularly financial mismanagement and poor governance. Upon reviewing the annual reports requested by the County Executive Committee Member in charge of Water and Irrigation, significant discrepancies were allegedly noted, including substantial outstanding customer bills, supplier debts, and overall liabilities, which rendered the Company technically insolvent.

31. It is contended that the Claimant failed to address performance gaps previously identified by the Board and failed to adhere to corporate governance standards.
  
32. It is further asserted that an audit and forensic report covering July 2017 to April 2018 revealed a conflict of interest in the renewal of the Claimant's contract, illegal and unprocedural procurement, irregular staff recruitment, and poor management practices. Following this, the Claimant was first sent on compulsory leave in February 2018, a decision later stayed by the Court, and was subsequently suspended on half pay on 27th June 2018 to allow investigations to proceed.
  
33. The Claimant was served with a notice to show cause and invited to attend disciplinary hearings on 25th, 26th, and 27th July 2018, during which he was informed of the charges and given the opportunity to respond and be accompanied. The Respondent states that the Claimant failed to provide satisfactory explanations in response to the charges. Consequently, by a letter dated 24th August 2018, the Board resolved to summarily dismiss him on

grounds of negligence of duty, irregular employment contract, non-adherence to procurement regulations, unprocedural recruitment of staff, and failure to properly advise the Board.

34. The witness maintained that the dismissal was lawful, procedurally correct, and in compliance with both the Employment Act and the Human Resource Policy Manual, and that the Claimant's rights to a fair hearing and the rules of natural justice were fully observed. It therefore contends that the claim for unfair termination is unfounded and that the reliefs sought cannot issue.

35. Cross-examined by Counsel for the Claimant, the witness testified that he has been a member of the Respondent's Board of Directors since 15th March 2018. He further stated that he was appointed as the acting Chairperson of the Board in December 2019. He had not worked for the Respondent before March 2018.

36. He further testified that the documents produced by the Respondent in evidence support his contention that the Claimant's service was characterised by fundamental

flaws. The documents include the Claimant's report, dated 2nd January 2018, the Auditor General's report for 2016-2017, and the Betika & Shulungu company report. The documents were sent to the Claimant via email. However, he cannot say with certainty that an email exists showing the documents were forwarded to the Claimant.

37. However, some of those documents are documents that he would interact with in the course of his employment as the Managing Director. The Auditor General's Report is dated 5<sup>th</sup> July 2018. The Claimant's disciplinary proceedings commenced on 26<sup>th</sup> July 2018, after receipt of the Auditor General's Report.

38. He testified that the Auditor's report concluded that the Respondent's state as a going concern could not be ascertained, given irregularities in the report. There was no order confirming that the Respondent had become insolvent.

39. The Claimant was sent on compulsory leave by the CECM, who was also a Board member. At the time, there was no Board in place. However, there was no vacuum, as the

CECM was exercising the Board's authority. Disciplinary action against a senior employee of the Respondent was the preserve of the Board of Directors. The Respondent's Human Resources Manual does not contemplate a situation in which disciplinary proceedings are handled by the CECM.

40. At the time of the suspension of the Claimant from office, the Respondent had only received the Betika & Shulunge Report.
41. In response to the suspension letter, the Claimant stated that the allegations therein were general and lacked specificity.
42. The only document on record showing that the Claimant was invited for a disciplinary hearing is the email sent to him on 25<sup>th</sup> July 2018 at 15:23. The email does not state the nature of the meeting for which the Claimant was being invited. However, it appears that there was a typing error; he was supposed to appear before the Committee on 26<sup>th</sup> July 2018, not 25<sup>th</sup> July 2018, as indicated in the

email. No subsequent email was sent to him to correct the mistake.

43. The minutes tendered in Court are merely a summary of what transpired during the three-day meeting. Otherwise, a detailed account of the proceedings can be found in a quire book, which hasn't been tendered in evidence before this Court. The minutes are signed only by the Chairman. It was an oversight that the Secretary did not sign them.
44. The witness stated that he was not certain whether the Claimant had been paid his terminal dues.
45. In his evidence under re-examination, the witness testified that the extension of the Claimant's contract of employment was not procedural. The extension was made without the Board's approval.
46. The initial contract was to run from 1<sup>st</sup> August 2015 to 31<sup>st</sup> July 2018. However, the renewed contract is expressed to have been renewed on 30<sup>th</sup> October 2017, nine months to the appointed lapse date. There were no minutes concerning the extension.

47. The second witness, CPA, Tom M. Olouch, testified that he prepared and forwarded an audit report to the Governor of Taita Taveta under the Instructions of Batika Accountants. They [Shulunge Accountants] forwarded their report to Betika on 25<sup>th</sup> April 2018. The report made various findings, including that the contract with Dannex Investment and Engineering Works Limited was, however, signed by Dannex Engineering Investment & Parts Limited, a different entity. The Claimant and others executed the contract on behalf of the Respondent.
48. Though the Board had suspended the salary increments for its employees, the increments were effected without their approval on 1<sup>st</sup> January 2016.
49. They found that the Claimant's employment had been renewed 9 months before the expiry of his initial contract, which was irregular and contrary to the stipulations of the Respondent's Human Resources Manual.

50. Cross -examined by Counsel for the Claimant, the witness testified that ordinarily audits for the Respondent could be conducted by the Auditor General.
51. Nothing has been placed before the Court from which it can be inferred that Betika subcontracted the audit work to Shilunge. The report doesn't bear the names of the persons who prepared it. It doesn't bear his too.
52. They did not involve the Claimant in the preparation of the report. The report explicitly states that the auditee was not asked to clarify anything. The documents mentioned in the report are not annexed to the report.

### **Claimant's Submissions**

53. The Claimant submits that he was employed as Managing Director on a three-year contract effective 1st August 2015, which was subsequently renewed on similar terms and was to run until 31st July 2021. He contends that his suspension and eventual summary dismissal on 31st August 2018 were unlawful, unfair and politically instigated following a change in the Respondent's Board after the County elections.

54. The Claimant argues that the County Executive Committee Member (CECM) had no authority to send him on compulsory leave on 1st February 2018, as he was an employee of the Board of Directors and the previous Board's term had expired. He maintains that no Board resolution sanctioned the decision and that he was neither given an opportunity to clarify issues arising from the reports he had submitted nor informed of any complaints before being sent on indefinite leave, a decision he successfully challenged in Court.
55. He further submits that upon resuming duty pursuant to Court orders, he was effectively locked out of office, removed as a bank signatory, and compelled to proceed on extended leave. He contends that the new Board Chairman expressly informed him that he had been instructed not to work with him, demonstrating that his removal was politically motivated rather than performance-based.

56. The Claimant challenges the suspension letter dated 27th June 2018, arguing that it relied on alleged audit reports that had not been released at the time and were never supplied to him despite his request. He submits that the letter referred to financial statements and an Auditor-General's Report that were either non-existent at the time or signed after the suspension, raising doubts as to their authenticity. He contends that the alleged audit reports were fabricated to justify an already predetermined decision.

57. The Claimant maintains that the renewal of his contract was lawful and initiated by the previous Board following a positive appraisal rating of 76%. He disputes the Respondent's reliance on Clause 7.9.7 of the Human Resource Manual, submitting that the clause applies to employees reporting to the Managing Director and not to the Managing Director himself, whose contract was renewed by the Board. He argues that he cannot be held accountable for actions taken by a duly constituted Board.

58. On procedural fairness, the Claimant submits that he was never formally invited to a disciplinary hearing as required under Section 41 of the Employment Act. He states that he only received a brief email requiring him to appear before the Board without disclosure of charges or notification of his right to representation.
59. He contends that the meeting held on 26th July 2018 was merely a general discussion chaired by the Human Resource Committee and not a full Board disciplinary hearing. He relies on **Wangui v Unaitas Sacco Limited (Cause 1716 of 2017) [2023] KEELRC 2022** and **Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK), Nakuru Civil Appeal No. 62 of 2018** to submit that failure to issue proper notice of charges and advise an employee of the right to representation renders termination procedurally unfair.
60. The Claimant further submits that the minutes produced by the Respondent were irregular, unsigned in material parts, inconsistent as to attendance and chairmanship,

and did not reflect a proper disciplinary sitting of the full Board as required under Clause 4.6.1 of the Human Resource Manual. He contends that the alleged disciplinary process was therefore a sham.

61. On substantive justification, the Claimant argues that the Respondent failed to prove valid reasons for termination as required under Sections 43 and 45 of the Employment Act. He maintains that the alleged audit reports were never availed to him, lacked supporting documentation, bore inconsistent dates, and were produced late in the proceedings. He also challenges the credibility of the second audit report produced through RW-2, submitting that no Board resolution appointing external auditors was exhibited and that the alleged auditor lacked proper certification and nexus to the Respondent.

62. The Claimant therefore submits that the Respondent failed to discharge its statutory burden of proving valid and fair reasons for termination and of demonstrating compliance with fair procedure. He maintains that his dismissal was unjustified, unlawful and politically motivated.

63. On remedies, the Claimant seeks three months' salary in lieu of notice pursuant to Clause 23 of his contract; maximum compensation for unfair termination under Section 49 of the Employment Act; gratuity at 31% for both the completed first contract term and the unexpired portion of the second term; payment of withheld half salary during suspension and salary for the remainder of the contract period up to July 2021; reimbursement of unpaid airtime allowance and mileage claims; and costs of the suit. He urges the Court to find that his termination was unfair and to grant the reliefs sought.

#### **Respondent's submissions**

64. The Respondent submits that the Claimant's termination was lawful and in strict compliance with the Employment Act, 2007, and its Human Resource Policy Manual. It relies on the case of **George Musamali v G4S Security Services Kenya Ltd [2016] eKLR** for the principle that fair termination requires both valid reasons and adherence to due procedure.

65. The Respondent contends that the Claimant, who served as Managing Director, was suspended following scrutiny of annual and audit reports which allegedly revealed serious financial and managerial irregularities. These included substantial outstanding customer bills, supplier debts, and financial discrepancies that, in its view, rendered the Respondent technically insolvent.
66. It further cites findings from internal and financial audit reports covering July 2017 to April 2018 which allegedly disclosed conflict of interest in the renewal of the Claimant's contract, irregular procurement, unprocedural recruitment, and poor management.
67. The Respondent maintains that the Claimant was summarily dismissed pursuant to Section 44 of the Employment Act on grounds of negligence of duty, non-compliance, irregular employment contract renewal, non-adherence to procurement laws, unprocedural recruitment, failure to advise the Board properly, and conflict of interest. It submits that these grounds fall

within the ambit of gross misconduct under Section 44(4) of the Act.

68. On specific allegations, the Respondent asserts that the Claimant admitted discrepancies in financial figures, including a variance of Kshs. 1,095,398 in a tender award. It further alleges that he issued the same tender to two similarly named companies without proof that they were the same entity, and that he irregularly renewed his own contract through self-appraisal without proper Board approval.

69. On procedure, the Respondent submits that the Claimant was suspended by a letter dated 27th June 2018 and granted 21 days to show cause. It states that he responded but failed to satisfactorily address the allegations. Thereafter, by a letter dated 20th July 2018, he was invited to attend disciplinary hearings held on 25th, 26th and 27th July 2018, where he was informed of the charges and his right to representation.

70. The Respondent relies on the case of **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** and

**Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR)** to submit that it complied with the requirements of Sections 41, 43 and 45 of the Employment Act by notifying the Claimant of the allegations, affording him a hearing, and considering his representations before resolving to summarily dismiss him by a letter dated 24th August 2018.

71. It further invokes Section 47(5) of the Employment Act to argue that it discharged its burden of justifying the grounds and procedure of termination on a balance of probabilities.

### **Analysis and determination**

72. I have carefully considered the pleadings, evidence and submissions by the parties herein and the following issues emerge for determination;

- 1) Whether the summary dismissal against the Claimant was unfair.
- 2) Whether the Claimant is entitled to the reliefs sought.

**Whether the summary dismissal against the was unfair.**

73. It is not in dispute that through its letter dated 24<sup>th</sup> August 2018, the Respondent summarily dismissed the Claimant from employment on the following grounds that were set out in the letter. The letter read in part;

***“You have been terminated for the following reasons***

***a) Negligence of Duty and Non—Compliance,***

***b) Irregular employment contract,***

***c) Unprocedural recruitment of staff, and***

***d) Non- adherence to laid down procurement regulations,***

***e) Failure to properly advise the Board of Directors.***

74. For summary dismissal of an employee or termination of an employee’s employment to pass the fairness test, it must be demonstrated that the decision to summarily dismiss the employee or terminate the employee’s employment was made pursuant to a process that was

procedurally fair and that the decision was substantively justified.

75. In **Naima Khamis v Oxford University press** the Court observed;

***“On the first issue, that is, whether the termination was lawful, we wish to take note of the provisions of Section 43[1] of the Employment Act, which provides that in any claim arising out of the termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45[2][c] requires a termination be done according to fair procedure. From the foregoing, termination of employment may be substantively and or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where***

***the employer fails to follow the laid-down procedure as per the contract or fails to accord the employee an opportunity to be heard as by law required.”***

76. It is trite law that procedural fairness requires the employer to clearly explain to the employee the accusations for which it is contemplated that the employment be terminated, to give the employee an opportunity to make representations on the grounds, and to consider those representations before making a final decision.

77. By virtue of the provisions of Section 45 [2] of the Employment Act, the duty to prove that the dictates of procedural fairness were complied with in terminating or summarily dismissing an employee lies with the employer. On the material placed before this Court, one cannot find difficulty in being persuaded by the Claimant that the Respondent didn't follow the procedural prescripts of the Employment Act.

78. By a letter dated 27th June 2018, the Claimant was placed on an investigatory suspension. The letter informed the Claimant of two allegations against him: non-performance and an irregular employment contract in his favour. It also required him to show cause why disciplinary action could not be taken against him on the basis of the allegations. There is no dispute that the Claimant responded to the show cause letter.

79. Ordinarily, and in line with the principles of procedural fairness, once an employee has been served with a show cause letter and has responded to it, the employer is under a duty to properly consider the response. After such consideration, the employer must make a clear determination: either the response is satisfactory, in which case the disciplinary process is terminated at that stage, or the response is unsatisfactory, in whole or in part, and the process should proceed further.

80. In either scenario, the employer must formally communicate its decision to the employee. If the employer finds the response unsatisfactory, it must specifically

identify the particular ground or grounds that remain in issue and expressly invite the employee to a hearing on those matters before any further adverse action is taken.

81. There is no doubt in my mind that after the Claimant's response, the Respondent did not get back to him with its decision on whether his response was satisfactory, and if it was not, it intended to proceed with the disciplinary process against him.

82. The Respondent's witness asserted that, on 25th July 2018, the Claimant was invited to a disciplinary hearing by email sent to the Claimant at 15:23, which stated that the hearing was scheduled for 25th July 2018. However, the witness admitted in his evidence under cross-examination, and correctly so, that the email was not specific as to the nature of the meeting he was being invited to. In other words, it did not state that he was being invited to a disciplinary hearing.

83. The Claimant asserted that the meeting, which he attended on 26th July 2018, was not a disciplinary hearing but one at which the new Board sought to be apprised of

the operations of the Respondent Company. Considering the manner in which the email was couched and the minutes presented in evidence, which apparently covered three days, I am persuaded by the Claimant that the meeting was not intended to be, and was not, a disciplinary hearing.

84. It is here that I must point out that not every meeting becomes a disciplinary hearing.

85. By reason of the premises, I find that the Claimant was not accorded a hearing, contrary to the dictates of procedural fairness set out in section 41 of the Employment Act, the Fair Administrative Action Act, Articles 47 [fair administrative action] and 50 [fair hearing] of the Constitution. In the case of **Registrar Judicial Service Commission & others vs LNM**, the Court elaborated on procedural fairness in the termination of employment, thus;

***“We begin this judgment by declaring that the fairness of any disciplinary process is today a constitutional imperative, irrespective of the***

***status of the officer involved. The process must uphold all the tenets of fair administrative action under Article 47 and the right to a fair hearing under Article 50 of the Constitution. In addition to these constitutional safeguards, by the provisions of the Judicial Service Act and the Fair Administrative Action, Cap 71, the disciplinary bodies, including the Judicial Service Commission [JSC], are bound to ensure that any disciplinary action against a judge, judicial officer and staff must strictly comply with both constitutional and statutory requirements.”***

86. Section 43 of the Employment Act places a duty upon the employer to prove the reason or reasons for the termination of an employee’s employment. The summary dismissal letter did set out the reasons for the summary dismissal. The Respondent’s witness testified that those were indeed the reasons for the dismissal.

87. The provision requires the reasons to be proved. Therefore, it would not be sufficient for the employer to simply state that the employee was dismissed for this or that reason. The employer must establish, by satisfactory and sufficient evidence, that the reasons generally existed.
88. This Court notes that one of the grounds cited for the dismissal of the Claimant from office is “unprocedural recruitment of staff”. I have carefully considered the evidence placed before this Court, and I see nothing that speaks to such recruitment. Who was recruited? When was the recruitment? For what roles? Why does the Respondent hold that the recruitment was unprocedural? These vital questions do not find any answers in the Respondent’s material placed before this Court.
89. In the letter, it was also stated that he was being dismissed for failure to advise the Board properly. The evidence before this Court does not explain what or when.
90. The Respondent further stated that the Claimant was summarily dismissed because of an irregular contract of

employment. I understand the Respondent to mean the extended contract. There is no dispute that the contract was extended under a letter executed by the then Chairman of the Board. There was no assertion that the letter was forged or fraudulent. All that the Respondent's witness did was to casually assert, without any shred of evidence, that the Claimant influenced the extension. This Court has not lost sight of the fact that the Claimant's evidence that his application letter for the extension of the contract followed the then Board's letter urging him to do so was not discounted.

91. In my view, the absence of any allegation of forgery or fraud concerning the letter suggests it wouldn't be reasonable to conclude that the Claimant committed gross misconduct. Therefore, such an act should not warrant a disciplinary sanction, such as summary dismissal, or any other disciplinary measure. At best, through an appropriate process, the Board could have recalled the letter if it believed the initial Board had not issued it properly.

92. Repeatedly, this Court has established that grounds not specified in a show cause letter or invitation letter, but which ultimately serve as the basis for the termination of an employee's employment, cannot constitute fair and valid grounds for dismissal pursuant to Section 45 of the Employment Act. Furthermore, an employer who terminates an employee based on grounds not outlined in the show cause letter— to which the employee responded and refuted the allegations—cannot be considered to have acted with equity and fairness as mandated by Section 45[7] of the Act.

93. It is worth noting that the grounds set out in the summary dismissal letter are more than and radically different from the two set out in the show cause letter, to which the Claimant responded.

94. It bears repeating that substantive fairness is sometimes intertwined with procedural fairness. There cannot be said to be a substantive justification for terminating an employee's employment on the grounds that he has not

been able to defend himself, because the employer deliberately failed to afford him an opportunity to do so.

95. In sum, I hold that the summary dismissal against the Claimant was both procedurally and substantively unfair.

### **Whether the Claimant is entitled to the reliefs sought**

#### **Three months' salaries in lieu of notice, Kshs. 750,000.00**

96. It is undisputed that the Claimant's employment was terminated without the three months' notice required by the contract. Having found that the summary dismissal was unfair, I find no reason not to grant him notice pay, three months' salary in lieu of notice.

#### **Compensation for unfair termination.**

97. Section 49[1][c] of the Employment Act bestows authority on the courts to grant a compensatory award where an employee has succeeded in a case for unfair termination. However, it is essential to note that the power is discretionary and exercised on a case-by-case basis. I have carefully considered the manner in which the

Claimant's employment was terminated, which can easily pass for an unfair labour practice, the non-adherence to the prescripts of procedural and substantive fairness in a manner that one cannot help but discern deliberateness on the part of the Respondent, and the length of the period the Claimant expected to serve the Respondent under the renewed contract, and hold that he is entitled to the compensatory relief to an extent of eight months' gross salary.

**Gratuity at 31% (Contract period 2015-2018 & 2018-2021), Kshs. 5,580,000.00.**

98. Under clause 12 of his contract of employment, the Claimant was entitled to a gratuity calculated at 31% of his annual salary for the years worked. The Respondent's witness admitted that there is no evidence that the Claimant received his terminal dues. I note that the Claimant has sought gratuity for the period of the 2nd contract, under which he never served. I have no statutory or contractual basis to award an anticipatory benefit. As such, the Claimant shall be entitled to gratuity for that period of the initial contract.

99. It was not in contention that during the suspension period the Claimant was placed on half salary. His evidence that he was not paid half the salary during that period [May-June 2018] was not rebutted. I award him the relief sought under this head.

100. He further asserted that he was not paid his salary for July and August 2018. He is hereby granted the same, as the Respondent did not assert or prove that he was paid.

101. I note that his claim for airtime allowance was not challenged at all. Air time allowance was a contractual entitlement. He is hereby granted for the period May to August 2018.

102. In the upshot, judgment is hereby entered for the Claimant for;

a) A declaration that the summary dismissal against him was unfair.

b) Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, eight months' gross salary, KShs. 2,000,000.00.

- c) Gratuity, KShs. 2,790, 000.
- d) Unpaid salary;
  - i. May -June [the period of suspension], KShs. 250,000.
  - ii. July -August 2018, KShs. 500,000.
- e) Airtime Allowance for May -August 2018, KShs. 20,000.
- f) Costs of the suit.
- g) Interest on the awarded sums above at court rates from the date of this judgment till full payment.

**Read Signed and Delivered this 19<sup>th</sup> Day of February 2026.**

**OCHARO KEBIRA**

**JUDGE**